9 FAM 40.41 Notes

(TL:VISA-492; 11-20-2002)
(Office of Origin: CA/VO/L/R)

9 FAM 40.41 N1 Background

(TL:VISA-230; 01-19-2001)

Several recent pieces of legislation underlie the changes in the "public charge" provisions:

(1) The Welfare Reform Act (officially The Personal Responsibility and Work Opportunity Reconciliation Act, or PRWORA, Public Law 104-193 of August 22, 1996). It added a new section, INA 213A, to the Immigration and Nationality Act (INA), which provides for legally binding affidavits of support (AOS) for the purpose of meeting the public charge requirements of INA 212(a)(4).

(2) The Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 (IIRIRA, Pub. L. 104-208) of September 24, 1996. It amended INA 212(a)(4) to require that an INA 213A-compliant AOS be submitted for all family-based immigrant visa applications (other than self-petitions) and for certain employment-based immigrant visa applicants.

(3) Subsequent amendments to the Welfare Reform Act (Public Law 105-33) restricted the public benefits previously available to most aliens in the United States, thus affecting the scope of public charge.

9 FAM 40.41 N2 Definition of "Public Charge"

(TL:VISA-230; 01-19-2001)

a. For the purpose of determining visa ineligibility under INA 212(a)(4), the term "public charge" means that an alien, after admission into the United States, is likely to become primarily dependent on the U.S. Government for subsistence. This means either:

(1) The receipt of public cash assistance for income maintenance [see 9 FAM 40.41 N2.1 below], or

(2) Institutionalization for long-term care at U.S. Government expense [see 9 FAM 40.41 N2.3]. Confinement in a medical institution for rehabilitation does not constitute such primary dependence.

b. When considering the likelihood of an applicant becoming such a “public charge”, consular officers must take into account, at a minimum, the factors specified in INA 212(a)(4)(B) [see 9 FAM 40.41 N4] (in addition to any required affidavit of support), in order to base the determination on the totality of the alien's circumstances at the time of visa application.

9 FAM 40.41 N2.1 Defining "Public Cash Assistance"

(TL:VISA-230; 01-19-2001)

In the "public charge" context, "public cash assistance for income maintenance" includes:

(1) Supplemental security income (SSI);

(2) Cash temporary assistance for needy families (TANF), but not including supplemental cash benefits or any non-cash benefits provided under TANF; and

(3) State and local cash assistance programs that provide for income maintenance (often called state general assistance).

9 FAM 40.41 N2.2 Benefits Not Considered "Public Cash Assistance for Income Maintenance"

(TL:VISA-230; 01-19-2001)

a. There are many forms of U.S. Government assistance that an alien may have accepted in the past, or that a consular officer may reasonably believe an alien might receive after admission to the United States, that are of a non-cash and/or supplemental nature. Certain programs are funded with public funds for the general good, such as public education and child vaccination programs, etc., and are not considered to be benefits for the purposes of INA 212(a)(4). Although the Welfare Act prohibits aliens from receiving many kinds of public benefits, it specifically exempts several of those indicated below. Neither the past nor possible future receipt of such non-cash or supplemental assistance may be considered in determining whether an alien is likely to become a public charge. These benefits include, but are not limited to:

(1) The Food Stamp Program;

(2) The Medicaid Program (other than payments under Medicaid for long-term institutional care);

(3) The Child Health Insurance Program (CHIP);

(4) Emergency medical services;

(5) The Women, Infants and Children (WIC) Program;

(6) Other nutrition and food assistance programs;

(7) Other health and medical benefits;

(8) Child-care benefits;

(9) Foster care;

(10) Transportation vouchers;

(11) Job training programs;

(12) Energy assistance, such as the low-income home energy assistance program (LIHEAP);

(13) Educational assistance, such as Head Start or aid for elementary, secondary or higher education;

(14) Job training;

(15) In-kind emergency community services, such as soup kitchens and crisis counseling;

(16) State and local programs that serve the same purposes as the federal in-kind programs listed above; and

(17) Any other Federal, state, or local program in which benefits are paid in-kind, by voucher or by any means other than payment of cash benefits to the eligible person for income maintenance.

b. In all cases, the underlying nature of the program reveals whether it is considered a "public charge" (i.e., is the program intended to be a primary source of cash for income maintenance)? Some programs which provide cash benefits for special purposes are supplemental and not for income maintenance. They include such help as transportation or child care benefits paid in cash, or one-time emergency payments made under TANF to avoid the need for on-going cash assistance.

c. Cash benefits that have been earned (e.g., social security payments, old age survivors disability insurance (OASDI), U.S. Government pension benefits and veterans benefits) are irrelevant to a public charge determination,

9 FAM 40.41 N2.3 Institutionalization for Long Term Care

(TL:VISA-230; 01-19-2001)

For INA 212(a)(4) purposes, "institutionalization for long-term care" refers to care for an indefinite period of time for mental or other health reasons, rather than temporary rehabilitative or recuperative care even if such rehabilitation or recuperation may last weeks or months.

9 FAM 40.41 N3 Applying INA 212(a)(4) to Immigrants

9 FAM 40.41 N3.1 Determining Likelihood of Ineligibility

(TL:VISA-342; 01-08-2002)

a. INA 212(a)(4) applies to all aliens seeking entry into the United States. With respect to immigrant visa applicants, the amount and type of evidence generally required is much greater than that required in a non-immigrant case. In all cases, however, consular officers must base their determination of the likelihood that the applicant will become a public charge on a reasonable future projection of the alien's present circumstances. Consular officers may not refuse a visa on the basis of "what if"-type considerations (e.g., "what if the applicant loses the job before reaching the intended destination", or "what if the applicant is faced with a medical emergency."). Instead, consular officers must assess only the "totality of the circumstances" existing at the time of visa application. [See 9 FAM 40.41 N4 below.] In short, consular officers must be able to point to circumstances which make it not merely possible, but likely, that the applicant will become a public charge, as defined in 9 FAM 40.41 N2, above.

b. It is possible, however, for an applicant to show he or she is not likely to become a public charge and yet be found ineligible under INA 212(a)(4) because of the 1996 amendment to that provision. Specifically, an applicant subject to the requirement for a specific type of affidavit of support (AOS) must have such an AOS, regardless of any or all other circumstances. Therefore, if the relative petitioner of such an applicant does not, or cannot, properly execute a Form I-864, *Affidavit of Support Under Section 213A of the Act,* that applicant must be considered ineligible for a visa as likely to become public charge.

9 FAM 40.41 N3.2 Applicants Required to Submit Form I-864, Affidavit of Support Under Section 213A of the Act

(TL:VISA-401; 04-26-2002)

a. Applicants in any of the following immigrant categories must present Form I-864, *Affidavit of Support, Under Section 213A of the Act* to the consular officer, properly executed in compliance with INA 213A, in order to establish their eligibility under INA 212(a)(4)(C):

(1) Immediate relatives, including:

(a) Spouse of a U.S. citizen;

(b) Parent of a U.S. citizen; and

(c) Child of a U.S. citizen (including adopted orphans).

NOTE: Certain children classified IR2 or IR3 do not need the Form I-864.

(2) Family-based preference applicants, including:

(a) Unmarried sons and daughters of U.S. citizens (P2);

(b) Spouses, children and unmarried sons and daughters of permanent resident aliens;

(c) Married sons and daughters of U.S. citizens; and

(d) Brothers and sisters of U.S. citizens.

(3) Certain employment-based preference applicants including:

(a) Beneficiary of a petition filed by a U.S. citizen or lawful permanent resident (LPR) alien relative who is the sole proprietor of the business filing the petition;

(b) Beneficiary of a petition filed by an entity in which a U.S. citizen or LPR relative of the alien has a 5% or greater ownership interest. (Note that in such cases, the petitioning entity cannot file the affidavit of support, but must show intent to honor the employment offer.) The citizen or LPR relative of the applicant to be employed by the petitioning entity must file the Form I-864 on behalf of the applicant.

(c) An accompanying or following-to-join family member of such immigrants, even if the principal applicant, at the time of his or her entry, was not required to submit Form I-864; and

(d) Applicants not subject to the requirements of Form I-864 must still meet the requirements of INA 212(a)(4) in light of the totality of their circumstances.

9 FAM 40.41 N3.3 Effect of Form I-864, Affidavit of Support Under Section 213A of the Act, on Public Charge Determinations

(TL:VISA-360; 03-04-2002)

A properly filed, non-fraudulent Form I-864, *Affidavit of Support Under Section 213A of the Act*, should normally be considered sufficient to overcome the INA 212(a)(4) requirements. In determining whether the INA 213A requirements creating a legally binding affidavit have been met, the credibility of an offer of support from a person who meets the definition of a sponsor and who has verifiable resources is not a factor—the affidavit is enforceable regardless of the sponsor's actual intent—and should not be considered by the consular officer.

9 FAM 40.41 N3.4 Certain IR2 and IR3 Applicants Do Not Require Form I-864, Affidavit of Support Under Section 213A of the Act

9 FAM 40.41 N3.4-1 Effect of Public Law 106-395

(TL:VISA-360; 03-04-2002)

Public Law 106-395 (The Child Citizenship Act of 2000) went into effect on February 27, 2001. The Act amended INA 320 to confer automatic citizenship upon certain categories of children born abroad upon their admission to the United States as lawful permanent residents. Since the obligations of a sponsor under a Form I-864, *Affidavit of Support Under Section 213A of the Act,* terminate when the sponsored alien acquires citizenship, the Department and INS have agreed that Form I-864 shall not be required for those categories of immigrants who will acquire citizenship upon admission to the United States. The applicant, however, is still subject to the public charge provision of INA 212(a)(4)(A).

9 FAM 40.41 N3.4-2 Immediate Relatives Not Required to Submit Form I-864, Affidavit of Support Under Section 312A of the Act

(TL:VISA-360; 03-04-2002)

a. Effective immediately, Form I-864, Affidavit of Support Under Section 312A of the Act, will **not/not** be required for the following categories of immigrants:

(1) Orphan classified IR3, provided the child will be admitted to the United States while still under age 18 and will reside in the United States with, and in the custody of, the adoptive U.S. citizen parent;

(2) Adopted child classified IR2 who meets the requirements of INA 101(b)(1)(E) provided the child will be admitted to the United States while under age 18 and will reside in the United States with, and in the custody of, the U.S. citizen parent; and

(3) A child classified IR2 (born in or out of wedlock) to a parent who is now a U.S. citizen provided the child will be admitted to the United States while still under age 18 and will reside in the United States with, and in the custody of, the U.S citizen parent.

b. Form I-864 will continue to be required for all other family-based immigrants, including biological and adopted children of U.S. citizens who are not eligible for automatic naturalization upon admission as a legal permanent resident. Form I-864 **will/will** continue to be required for:

(1) Alien classified IR-2 based on a stepparent-stepchild relationship with a U.S. citizen;

(2) Alien classified IR-2 who will be age 18 or over upon admission to the U.S. as a lawful permanent;—alien classified IR-2 who will not be taking up residence in the United States;

(3) Alien classified IR-2 who will not be residing with, and in legal custody of, the U.S. citizen parent and;

(4) Alien classified IR-4.

c. An alien exempt from the Form I-864 requirement must still show that he or she is not likely to become a public charge. However, absent unusual circumstances, INA 320 will generally mean that it is not likely that the alien—while still an alien prior to naturalization—will become a public charge. Consular officers should also keep in mind that the INS does not approve the Form I-600, *Petition to Classify Orphans as an Immediate Relative*, or Form I-600A, *Application for Advance Processing of Orphan Petition*, unless satisfied that the petitioners are capable of supporting the child.

9 FAM 40.41 N4 Determining "Totality of the Circumstances"

(TL:VISA-230; 01-19-2001)

a. In making a determination regarding an alien's eligibility under INA 212(a)(4), a consular officer must consider, at a minimum, the alien's:

(1) Age;

(2) Health;

(3) Family status;

(4) Assets;

(5) Financial status and resources; and

(6) Education or skills.

b. These factors, coupled with the affidavit of support in those cases where it is required, and any other factors thought relevant by a consular officer in a specific case, will make up the "totality of the circumstances" that the officer must consider when making a public charge determination.

9 FAM 40.41 N4.1 Consideration of Current or Prior Receipt of Public Assistance

(TL:VISA-342; 01-08-2002)

a. The public charge provisions of INA 212(a)(4) are generally considered to be forward looking. Consular officers must, therefore, base findings of ineligibility on the likelihood of the applicant becoming a public charge in the future. A finding of ineligibility under INA 212(a)(4) cannot be based solely on the prior receipt of public benefits. Neither should consular officers base a determination exclusively on even the current receipt of subsistence cash benefits or institutionalization. The determination should always be based upon all available factors. Past or current receipt of cash benefits for income maintenance by a family member of the visa applicant may be factored into the applicant's case only when such benefits also constitute(d) the primary means of subsistence of the applicant.

b. Past or current receipt of other types of benefits, such as those listed in 9 FAM 40.41 N2.2, must not be considered. Further, consular officers should not try to find out whether an alien has previously or is currently receiving benefits such as those listed in 9 FAM 40.41 N2.2.

c. There is no provision in the law to indicate that the receipt of means-tested benefits by the sponsor would, and of itself, result in a finding of ineligibility for the applicant under INA 212(a)(4). The sponsor's reliance on such benefits, however, would clearly be an important factor in considering whether the applicant might have to become a public charge. If the sponsor or any member of his or her household has received public means-tested benefits within the past three years, consular officers must review fully the sponsor's current ability to provide the requisite level of support, taking into consideration the kind of assistance provided and the dates received. The consular officer must review carefully Form I-864, *Affidavit of Support Under Section 213A of the Act,* or Form I-134, *Affidavit of Support and all attachments submitted with the Affidavit of Support (AOS),* as well as evidence of the sponsor's current financial circumstances, in such cases.

9 FAM 40.41 N4.2 Health

(TL:VISA-230; 01-19-2001)

Consular officers must take into consideration the panel physician's report regarding the applicant's health, especially if there is a prognosis that might prevent or ultimately hinder the applicant from maintaining employment successfully.

9 FAM 40.41 N4.3 Family Status

(TL:VISA-230; 01-19-2001)

Consular officers should consider the marital status of the applicant and, if married, the number of dependents for whom he or she would have financial responsibility.

9 FAM 40.41 N4.4 Applicant's Age

(TL:VISA-230; 01-19-2001)

Consular officers should consider the age of the applicant. If the applicant is under the age of 16, he or she will need the support of a sponsor. If the applicant is 16 years of age or older, consular officers should consider what skills the applicant has to make him or her employable in the United States.

9 FAM 40.41 N4.5 Education and Work Experience

(TL:VISA-230; 01-19-2001)

Consular officers should review the applicant's education and work experience to determine if these are compatible with the duties of the applicant's job offer (if any). Consular officers should consider the applicant's skills, length of employment, and frequency of job changes. Even if a job offer is not required, consular officers should assess the likelihood of the alien's ability to become or remain self-sufficient, if necessary, within a reasonable time after entry into the United States. [See also 9 FAM 40.41 N4.7.]

9 FAM 40.41 N4.6 Alien's Financial Resources

9 FAM 40.41 N4.6-1 Aliens Subject to INA 212(a)(4)(C)/(D)

(TL:VISA-230; 01-19-2001)

An alien who must have Form I-864, *Affidavit of Support Under Section 213A of the Act*, will generally not need to have extensive personal resources available unless considerations of health, age, skills, etc., suggest that the likelihood of his or her ever becoming self-supporting is marginal at best. In such cases, of course, the degree of support that the affiant will be able and likely to provide becomes more important than in the average case.

9 FAM 40.41 N4.6-2 Evidence of Support When Form I-864, Affidavit of Support Under Section 213A of the Act, Not Required

(TL:VISA-342; 01-08-2002)

a. An applicant relying solely on personal financial resources for support for him or herself and family members after admission into the United States should be presumed ineligible for a visa under INA 212(a)(4) unless his or her income (including any to be derived from prearranged employment) will equal or exceed the poverty guideline level for the applicant and accompanying family members. The consular officer should refer to 9 FAM 40.31 Exhibit I Poverty Income Guideline Table published by the Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services.

b. Normally, all accompanying dependent family members and other dependent family members already in the United States are considered to be within the family unit for purposes of applying the poverty income guidelines. However, an applicant seeking to join a lawfully admitted permanent resident and two citizen children in the United States who are receiving public assistance may be determined to be eligible under the public charge provision if the applicant's prospective income will exceed that shown on the poverty income guideline table for a single person. In this instance only, it does not matter that the applicant's prospective income will be below that shown in the poverty income guideline table for a family of four. It is quite possible that the admission of the applicant and the applicant's income in the United States may permit the lowering of the public assistance benefits the family members now receive.

c. The consular officer should not rely exclusively on the submission of documents to determine eligibility. Repeated requests for documents in an effort to resolve every small doubt should be avoided. There is a limit to the value of documents in a situation in which the applicant must satisfy the officer of his or her future activities, intentions, and prospects.

d. Consular officers should make every effort to inform applicants in advance of the visa interview of the required support documents. The officer should be in a position to issue or deny the visa under INA 212(a)(4) at the end of the initial visa interview, assuming that the applicant has made reasonable efforts to submit the evidence originally requested. (For example, in cases where a Form I-864, *Affidavit of Support Under Section 213A of the Act*, is required, an application cannot be considered until that document and related information have been executed and considered satisfactory by the consular officer.) Applicants who are not likely to overcome the public charge provision even after the presentation of additional evidence should be refused. Adequate time and effort spent during the initial interview can save work for the post and the applicant in this respect.

e. An applicant may establish the adequacy of financial resources by submitting evidence of bank deposits, ownership of property or real estate, ownership of stocks and bonds, insurance policies, or income from business investments sufficient to provide for his or her needs, as well as those of any dependent family member, until suitable employment is located. (The amount sufficient will depend on the applicant's age, physical condition, and family circumstances and size.).

(1) Bank Deposits—Applicants relying on bank deposits to meet the public charge requirements should present as evidence a letter signed by a senior officer of the bank over the officer's title, showing:

(a) The date the account was opened;

(b) The number and amount of deposits and withdrawals during the last 12 months;

(c) The present balance. This information may prevent attempted abuse such as an initial deposit of a substantial sum of money being made within a relatively short time prior to the immigrant visa application; and,

(d) How the money, if in a foreign bank in foreign currency, is to be transferred to the United States.

(2) Real estate investments—Evidence of property ownership may be in the form of a title deed or equivalent or certified copies. The applicant must satisfy the consular officer as to the plans for disposal or rental of such property and the manner in which the income from the property (if abroad) is to be transferred to the United States for the applicant's support.

(3) Stocks and Bonds—Evidence of income from these sources should indicate present cash value or expected earnings and, if the income is derived from a source outside the United States, a statement as to how the income is to be transferred to the United States.

(4) Income from business investments; or

(5) Insurance policies.

e. An applicant may also support a finding that he and/or she meets the public charge requirements by:

(1) Evidence of employment of a permanent nature in the United States that will provide an adequate income. A certified Labor Department Form ETA-750 - Part A, *Application for Alien Employment Certification*, will show this if the applicant is subject to the provisions of INA 212(a)(5)(A). If the labor certification provisions do not apply, the employer may submit a notarized letter of employment, in duplicate, on letterhead stationery attesting to the offer of prearranged employment; or

(2) Assurance of support by relatives or friends in the United States.

f. Sufficient support from a combination of the above sources.

9 FAM 40.41 N4.6-3 Use of Form I-134, Affidavit of Support Under INA 213A

(TL:VISA-342; 01-08-2002)

a. With the required use of Form I-864, *Affidavit of Support Under Section 213A of the Act*, under INA 212(a)(4)(C) and INA 213A for so many classes of immigrants, the use of the Form I-134, *Affidavit of Support*, will be drastically reduced. Nevertheless, there still are circumstances when Form I-134 will be beneficial. This affidavit, submitted by the applicant at the request of the consular officer, is not legally binding on the sponsor and should not be accorded the same weight as Form I-864. Form I-134 should be given consideration as one form of evidence, however, in conjunction with the other forms of evidence mentioned below.

b. If any of the following applicants need an Affidavit of Support to meet the public charge requirement, they must use the Form I-134, as they are not authorized to use the Form I-864:

(1) The self-petitioning spouse of a deceased U.S. citizen, and any children therefrom [see INA 204(a)(1)(A)(ii)];

(2) The self-petitioning spouse of a U.S. citizen, and any children therefrom, who has been battered by or subjected to extreme cruelty perpetrated by the spouse [see INA 204(a)(1)(A)(iii) and (iv)];

(3) Returning resident aliens;

(4) Diversity visa applicants; and

(5) Fiancé(e)s.

c. The simple submission of Form I-134, however, is not sufficient to establish that the beneficiary is not likely to become a public charge. Although the new income requirements of the Form I-864 do not apply in such cases (i.e., the 125 percent minimum income, the need for 3 years income tax returns), consular officers must make a thorough evaluation of other factors, such as:

(1) The sponsor's motives in submitting the affidavit;

(2) The sponsor's relationship to the applicant, (e.g., relative by blood or marriage, former employer or employee, schoolmates, or business associates);

(3) The length of time the sponsor and applicant have known each other;

(4) The sponsor's financial resources; and

(5) Other responsibilities of the sponsor.

NOTE: When there are compelling or forceful ties between the applicant and the sponsor, such as a close family relationship or friendship of long standing, the affidavit may be favorably considered by the consular officer. On the other hand, an affidavit submitted by a casual friend or distant relative who has little or no personal knowledge of the applicant has more limited value. If the sponsor is not a U.S. citizen or lawful permanent resident, the likelihood of the sponsor's support of an immigrant visa applicant until the applicant can become self-supporting is a particularly important consideration.

d. The degree of corroborative detail necessary to support the affidavit will vary depending upon the circumstances. For example, for a relatively short-term visitor, little, if any, would be required. In immigrant cases, however, the sponsor's statement should include:

(1) Information regarding income and resources;

(2) Financial obligations for the support of immediate family members and other dependents;

(3) Other obligations and expenses; and

(4) Plans and arrangements made for the applicant's support in the absence of a legal obligation toward the applicant.

e. To substantiate the information regarding income and resources, the sponsor should attach to the affidavit:

(1) A statement from an employer showing the sponsor's salary and the length and permanency of employment;

(2) A copy of the latest income tax return;

(3) A statement from an officer of a bank regarding any accounts, showing the date the account was opened and the present balance, or

(4) Other evidence adequate to establish the sponsor's financial ability to carry out the commitment toward the immigrant for what might be an indefinite period of time.

f. If the sponsor has a well-established business and submits a rating from a recognized business rating organization, consular officers do not need to insist on a copy of the sponsor's latest income tax return or other evidence.

9 FAM 40.41 N4.6-4 Considering a Public Charge Bond

(TL:VISA-492; 11-20-2002)

a. If the continued financial capability of the applicant or any sponsor(s) is questionable, a consular officer may consider requiring the sponsor to post an indemnity bond pursuant to INA 213. Although the posting of a public charge bond does not, in itself, establish that an applicant is not likely to become a public charge, it might be sufficient, depending upon the circumstances in a particular case, to make possible a finding of eligibility under INA 212(a)(4). The bond should be used sparingly and only in borderline cases. When an applicant appears likely on the facts to become a public charge (for example because of an acute physical condition and lack of adequate resources), the filing of a bond would not serve any purpose if the needs of the applicant would easily overcome the value of the bond.

b. The specifics of such a bond and the means of posting one are:

(1) The minimum amount is $1,000 per person;

(2) If a family is proceeding as a unit to the United States, a bond may be required for more than one member of the family. The consular officer should specify the name(s) of the person(s) for whom a bond is being requested. If only the principal applicant is immigrating immediately, the number of remaining family members should not be taken into account until they are applying for visas;

(3) A public charge bond is canceled when the alien dies, leaves the United States permanently, or is naturalized. The INS may, however, cancel a bond at any time if the alien has not become and does not appear likely to become a public charge five years after the entry into the United States. The bond will be reviewed for cancellation upon the filing of Form I-356, Request for Cancellation of a Public Charge Bond, if the alien has not become a public charge during those five years;

(4) The consular officer should inform the alien, in these cases, that INS may require a larger bond to be posted at the time of application for admission; and

(5) The visa issued in such cases must carry a notation that the bond was required and the notification (or a certified copy thereof) from INS that the bond had been posted must be attached to the visa.

9 FAM 40.41 4.7 Employment Offer

9 FAM 40.41 N4.7-1 Applicant Subject to AOS Requirement

(TL:VISA-342; 01-08-2002)

Consular officers may not consider an offer of employment to an applicant in place of a required Form I-864, *Affidavit of Support Under Section 213A of the Act*. A consular officer may consider the applicant's employment in determining whether the 125 percent minimum income requirement has been met in a visa case only if the beneficiary of the Form I-864:

(1) Is currently living in the United States, and

(2) Working in the same job he or she will have after entry as an immigrant. Under these circumstances, the alien's income may be considered part of the sponsor's income. On the other hand, if those criteria are not met and the petitioner and/or sponsor's income barely meets the 125 percent requirement, the fact that the applicant has an immediate prospective salary to support him or herself and accompanying dependents would be a positive factor that might allow for a finding of eligibility with regard to INA 212(a)(4). If the above criteria are met, and any of the applicant's family members will be accompanying him and/or her to the United States, the principal applicant in such cases may provide an Form I-864A, *Contracts Between Sponsor and Household Member,* on their behalf to help reach the additional income level that will be required.

9 FAM 40.41 N4.7-2 Immigrants Not Subject to Affidavit of Support (AOS) Requirement

(TL:VISA-230; 01-19-2001)

a. Many applicants who have been offered prearranged employment and are immigrating based on that offer of employment are subject to the labor certification requirement under INA 212(a)(5) [See 9 FAM 40.51.] The consular officer may assume, when a certification is granted, that the position is permanent and the wages will not be perceptibly lower than U.S. standards. However, a determination must still be made whether the proposed wages will be adequate to meet the living expenses of the applicant and family, taking into consideration such factors as the number, age and health of family members. Applicants who are not subject to the provisions of INA 212(a)(5), but who are relying on prearranged employment to meet the public charge provisions of the law, must have the employment offer submitted on a notarized letter, in duplicate, on letterhead stationery.

b. Consular officers should discuss with such immigrant visa applicants the terms of the prearranged employment offer stated in Form ETA-750A, *Application for Alien Employment Certification*, or in the letter written on the employer's letterhead stationery. If the understanding of the applicant with regard to the salary to be paid, working hours per week, or possible repayment of transportation costs differs materially from the conditions indicated in the offer, the officer should require additional evidence, both to establish the validity of the INA 212(a)(5) certification or employer's letter, and to ensure that the applicant is not likely to become a public charge. The officer should also be reasonably satisfied that the applicant is qualified for the prospective employment.

c. The applicant's destination as stated on the visa application must coincide with the place of proposed employment.

9 FAM 40.41 N5 Form I-864, Affidavit of Support Under Section 213 A

(TL:VISA-230; 01-19-2001)

The purpose of the INA 213A affidavit of support is to create a legally binding contract between certain immigrant visa applicants, their sponsor(s) and the government. It requires an applicant to have sponsorship at 125% of the federally determined poverty income guidelines (or 100 percent if the sponsor is an active member of the U.S. Armed Forces, sponsoring his or her spouse or child(ren)) to ensure that newly-arrived aliens will be able to subsist for an extended period at a level above the poverty level. The intention is to encourage immigrants to become and remain self-reliant, one of the oldest tenets of national immigration policy, and to provide the government with indemnification if they do not.

9 FAM 40.41 N5.1 Affidavit of Support Packet

(TL:VISA-342; 01-08-2002)

a. The Attorney General has approved the documents listed below, which must be handed out together as a single packet, to assist the sponsor's understanding and proper completion of the affidavit of support required by INA 213A:

(1) Form I-864, *Affidavit of Support Under Section 213A of the Act;*

(2) Current Federal Poverty Guidelines;

(3) Form I-864A, *Contract Between Sponsor and Household Members*, agreeing to make their assets available to reimburse the costs of any benefits received by the sponsored applicant;

(4) Form I-865, *Sponsor's Notice of Change of Address*, and

(5) Checklist for Preparing the Form I-864.

b. The National Visa Center (NVC) will include the checklist and other documents in the Packet 3, indicating the supporting documents required with the affidavit of support. Posts should reproduce the checklist for local use and include it with the Forms I-864 that are distributed locally. Posts should also, when possible, make it available through websites and information units. Posts must attach a copy of the checklist to any INA 221(g) refusal letters for incomplete or incorrectly completed Forms I-864. The post must maintain updated poverty guidelines and ensure that they are included with all affidavits of support forms.

c. This documentation, supported by items listed in 9 FAM 40.41 N5.3, constitutes the primary (but not sole) evidence for establishing eligibility under INA 212(a)(4)(C) for those categories specified in 9 FAM 40.41 N3.2 above, and establishes the sponsor's income and, if need be, assets.

d. The initial validity of the Form I-864 is generally one year; i.e., the sponsors and contributing household members must have signed the Forms I-864 and I-864A, within one year prior to the initial interview. Once submitted, the affidavit itself will remain valid indefinitely. However, since the affidavit of support is based on the Federal Poverty Guidelines in effect at the time of the visa issuance, it may have to be updated (e.g., with a new income tax statement). Moreover, the consular officer must be satisfied that the information provided in the affidavit remains current or that any changes which may have occurred do not affect the sufficiency of the affidavit. (Examples of changes that would not affect the sufficiency of the affidavit might include an increase in the sponsor's income or a change in the household size where the income nevertheless remains sufficient.) In cases in which the consular officer believes that major changes affecting the sufficiency of the affidavit have occurred, the applicant must submit a new Form I-864.

e. Newly issued poverty guidelines become effective for INA 213A affidavit purposes one month after being published in the Federal Register.

9 FAM 40.41 N5.2 Defining "Sponsor"

(TL:VISA-230; 01-19-2001)

a. To qualify as a sponsor, an individual must be a natural person (not a corporation or other business entity) who:

(1) Is a citizen, national, or lawful permanent resident (LPR) of the United States;

(2) Is at least 18 years of age;

(3) Filed the petition which forms the basis for the visa application (or has a substantial interest in the entity which filed the petition); and

(4) Is domiciled in any of the several states of the United States, the District of Columbia, or any territory or possession of the United States. [See 9 FAM 40.41 N6.]

b. If the relative petitioner does not meet the qualifying criteria to be a sponsor (for example, by being under 18 years of age or not domiciled in the United States), the visa applicant must be found ineligible for a visa under INA 212(a)(4) until such circumstance no longer exists.

9 FAM 40.41 N5.2-1 Petitioner Must Submit Form I-864 Affidavit of Support Under Section 213A

(TL:VISA-342; 01-08-2002)

A petitioner meeting the criteria in 9 FAM 40.41 N5.2 must submit Form I-864, *Affidavit Under Section 213A of the Act*, even if he or she cannot meet the income requirements outlined in 9 FAM 40.41 N5.1. Such adverse circumstances would not necessarily mean that the applicant would be ineligible under INA 212(a)(4), since a joint sponsor may be used to overcome the federal poverty level income requirements. [See 9 FAM 40.41 N8.] There is only one exception to the requirement of the petitioner completing Form I-864. That is if, or when, the petitioner is a business entity. In such a case, a citizen or LPR relative having a significant ownership interest (if any) in the petitioning business must submit Form I-864.

9 FAM 40.41 N5.2-2 Limiting Number of Applicants Sponsored

(TL:VISA-230; 01-19-2001)

A petitioner may limit sponsorship to just the principal applicant and any dependents that will be traveling to the United States at the same time. By limiting the number of sponsored individuals, the petitioner will reduce the household size and thereby lower the income requirement. The petitioner could file another affidavit of support on behalf of the other (following to join) dependents at a later date when the petitioner and the principal applicant have improved their financial situation.

9 FAM 40.41 N5.3 Petitioner Must Submit Form I-864, Affidavit of Support Under Section 213A of the Act

(TL:VISA-395; 04-15-2002)

In most cases, the petitioner must submit Form I-864, *Affidavit of Support Under Section 213A of the Act*. This is true even if he or she cannot meet the income requirements outlined in 9 FAM 40.41 N5.1. Such adverse circumstances would not necessarily mean that the applicant would be ineligible under INA 212(a)(4), since a joint sponsor may be used to overcome the federal poverty level income requirements. [See 9 FAM 40.41 N8.] There are, however, two exceptions to the requirement of the petitioner completing Form I-864. See 9 FAM 40.41 N5.3-1 and 9 FAM 40.41 N5.3-2 below for the exceptions.

9 FAM 40.41 N5.3-1 Sponsor When the Petitioner is a Business Entity

(TL:VISA-395; 04-15-2002)

When the petitioner is a business entity, a U.S. citizen or lawful permanent resident relative who has a significant ownership interest in the petitioning business, the petitioner must submit Form I-864, *Affidavit of Support Under Section 213A of the Act*. The alternative sponsor must meet the other criteria outlined in 9 FAM 40.41 N5.2.

9 FAM 40.41 N5.3-2 Sponsor When the Petitioner Has Died

(TL:VISA-395; 04-15-2002)

Public Law 107-150 permits the substitution of an alternative sponsor if the original sponsor dies and if the Attorney General has determined for humanitarian reasons that the original sponsor's petition should not be revoked. The alternative sponsor must be the spouse, parent, mother-in-law, father-in-law, sibling, child (at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild of the sponsored alien, or the legal guardian of the sponsored alien. The alternative sponsor must meet the other criteria outlined in 9 FAM 40.41 N5.2.

9 FAM 40.41 N6 "Domicile"

9 FAM 40.41 N6.1 Definition

(TL:VISA-230; 01-19-2001)

For the purposes of INA 213A, "domicile" means the place where a sponsor has a "residence" (as defined in INA 101(a)(33)) in the United States, with the intention of maintaining that residence for the foreseeable future. A permanent resident alien living abroad temporarily, may be considered to be domiciled in the United States, if he or she has applied for and obtained the preservation of residence benefit under INA 316(b) or INA 317. A U.S. citizen employed abroad will be considered domiciled in the United States, if the citizen's employment meets the requirements of INA 319(b)(1).

9 FAM 40.41 N N6.1-1 Maintaining U.S. Domicile

(TL:VISA-342; 01-08-2002)

a. Unless the petitioner meets the conditions outlined in 9 FAM 40.41 N6.2, below, a petitioner who is maintaining a residence outside the United States could not normally claim a U.S. domicile and would be ineligible to submit Form I-864, *Affidavit of Support Under Section 213A of the Act*. In order to provide an AOS for his or her relative, such a petitioner would have to reestablish a domicile in the United States. [See 9 FAM 40.41 N6.1-3, below].

b. However, in a situation in which the petitioner has maintained both a U.S. residence and a residence abroad, the consular officer must determine which is the principal abode. Some petitioners have remained abroad for extended periods but still maintain a principal residence in the United States (i.e., students, contract workers, and Non-Governmental Organization (NGO) volunteers). To establish that one is also maintaining a domicile in the United States, the petitioner must satisfy the consular officer that he or she:

(1) Departed the United States for a limited, and not indefinite, period of time;

(2) Intended to maintain a U.S. domicile at the time of departure; and,

(3) Can present convincing evidence of continued ties to the United States.

9 FAM 40.41 N6.1-2 Establishing U.S. Domicile

(TL:VISA-230; 01-19-2001)

a. A petitioner living abroad not meeting the criteria in 9 FAM 40.41 N6.1-1 who wishes to qualify as a sponsor, must travel to the United States and set up a principal residence where he or she intends to reside. The sponsor must establish an address (a house, an apartment, or arrangements for accommodations with family or friend) and must take up physical residence there. Although there is no time frame for the resident to establish residence, the consular officer must be satisfied that the sponsor has, in fact, taken up residence in the United States. If a petitioner is not domiciled in the United States, a joint sponsorship cannot be accepted and the applicant must be refused pursuant to INA 212(a)(4). Evidence that the sponsor has established a residence may include the following (in addition to having an address):

(1) Opening a bank account;

(2) Transferring funds to the United States;

(3) Making investments in the United States;

(4) Seeking employment in the United States;

(5) Registering children in U.S. schools;

(6) Applying for a social security number; and

(7) Voting in local, state or federal elections.

b. The sponsor does not have to precede the applicant to the United States but, if he or she does not, he or she must at least arrive concurrently with the applicant.

9 FAM 40.41 N N6.1-3 U.S. Domicile for Employment-based Petitioner

(TL:VISA-342; 01-08-2002)

Employment-based beneficiaries who are petitioned for by U.S. citizen or permanent resident alien relatives or by entities in which such a relative has a significant ownership interest are required to submit a Form I-864, *Affidavit of Support Under Section 213A of the Act*. However, the INS has determined that Congress did not intend to impose this requirement on a petitioning relative, or a relative with a substantial interest in a business enterprise who is not a U.S. citizen or an LPR and is not domiciled in the United States. In these cases only, the lack of Form I-864 will not be an impediment to admissibility. The Department concurs with this finding; therefore, in these cases, lack of a Form I-864 would not be an impediment to visa issuance. It seems unlikely there will be more than a relatively few such cases.

9 FAM 40.41 N N6.2 Defining "Qualifying Employment Abroad"

(TL:VISA-230; 01-19-2001)

a. INA 319(b)(1) defines "qualifying employment abroad" as being in the employ of:

(1) The U.S. Government;

(2) An U.S. institution of research recognized as such by the Attorney General;

(3) An U.S. firm or corporation engaged in whole or in part in the development of foreign trade and commerce with the United States or a subsidiary thereof;

(4) A public international organization in which the United States participates by treaty or statute;

(5) A religious denomination having a bona fide organization in the United States, if the individual concerned is authorized to perform the ministerial or priestly functions thereof; and

(6) A religious denomination or an international mission organization having a bona fide organization in the United States, if the person concerned is engaged solely as a missionary.

b. See INA 316 and 317 regarding continuous residence requirements for LPRs'.

9 FAM 40.41 N7 "Household Member"

9 FAM 40.41 N7.1 Definition

(TL:VISA-342; 01-08-2002)

Household members for determining the applicable Federal Poverty Line levels and all other associated purposes include:

(1) The sponsor,

(2) All persons related to the sponsor by birth, marriage or adoption living in the sponsor's residence,

(3) The sponsor's dependents (all persons identified as such on the sponsor's federal income tax return for the most recent year),

(4) Any immigrants previously sponsored using Form I-864, *Affidavit of Support Under Section 213A of the Act,* if the obligation has not terminated, and

(5) The intending immigrants listed in part 3 of the Form I-864.

9 FAM 40.41 N7.2 Use of Form I-864A, Contract Between Sponsor and Household Member

(TL:VISA-342; 01-08-2002)

a. If a sponsor's individual income meets or exceeds the required level of the Poverty Guidelines, no other evidence is necessary. In cases in which the sponsor's individual income is insufficient, however, a Form I-864A, *Contract Between Sponsor and Household Member,* must be submitted by any household member who is willing for his or her income to be used by the sponsor to meet the guidelines. The primary sponsor must include the names of these individuals and their contributions on his and/or her Form I-864, *Affidavit of Support Under Section 213 A*.

b. Under Form I-864A, the household member agrees to provide as much financial assistance as may be necessary to enable the sponsor to maintain the sponsored immigrant(s) at the required annual income level. The household member will be legally liable for any reimbursement obligations that the sponsor may incur.

9 FAM 40.41 N7.3 Applicant's Use of Form I-864A, Contracts Between Sponsor and Household Member

(TL:VISA-342; 01-08-2002)

a. If the sponsored immigrant has accompanying family members, he or she may submit Form I-864A, *Contracts Between Sponsor and Household Member*, only if his or her income derives from ongoing employment, or other source of income, in the United States. It cannot be based on an offer of employment that has not yet been effected. [See 9 FAM 40.41 N4.6 above]

b. If the sponsored immigrant does not have accompanying family members, he and/or she cannot submit Forms I-864A. His or her income may be counted in the household income, however, if he and/or she will continue to work in the same job after he and/or she immigrates to the United States. Officers may request evidence of the applicant's income such as pay statements and tax returns, if he was required to file them, and should request a letter from the employer certifying that the employment will continue after the applicant's immigration to the United States.

9 FAM 40.41 N8 Defining "Joint Sponsor"

(TL:VISA-342; 01-08-2002)

a. A "joint sponsor" is one who is not the petitioner for the sponsored immigrant but who otherwise meets the citizenship, residence, age, and 125% household income requirements, as set forth in N5.2, and has executed a separate Form I-864, *Affidavit of Support Under Section 213A of the Act*, on behalf of the intending immigrant. If a petitioner or sponsor meets the minimum income requirements, no joint sponsor may submit Form I-864 unless the consular or immigration officer specifically requires it. An intending immigrant may not have more than one joint sponsor.

b. A joint sponsor is jointly and severally liable with petitioning sponsor and any household members who have signed a Form I-864A. He or she must individually meet the minimum income requirements as set forth above. Anyone outside the petitioner's household may be considered a joint sponsor. Joint sponsors may include the income and assets of members of their own household and dependents to meet the income requirement.

c. In the event a sponsor has died before all family members have followed to join the principal, a joint sponsor is permitted to execute a Form I-864. In such a case, there is no requirement that the consular officer must request a joint sponsor. The new sponsor may submit a Form I-864, regardless of the status of the deceased petitioner's estate.

9 FAM 40.41 N9 Legal Obligations of Sponsors

(TL:VISA-342; 01-08-2002)

a. The execution of Form I-864, *Affidavit of Support Under Section 213A of the Act*, creates a legally-binding contract between the sponsor(s) (including any household members who have executed Form I-864A, *Contracts Between Sponsor and Household Member*, and any joint sponsor), and any federal, state, local or private entities that provide means-tested public benefits throughout the duration of the contract. By executing the Form I-864, the sponsor agrees to:

(1) Provide financial support necessary to maintain the sponsored immigrant at an income that is at least 125 percent of the federal poverty guidelines for the indicated family size, and

(2) Reimburse any agencies that provide means-tested benefits to a sponsored alien.

b. In most cases, an alien is not eligible to receive any federal benefits during their first five years in the United States. Although the alien may obtain public benefits thereafter, disbursing entities may seek reimbursement from the alien's sponsor for certain means-tested benefits received by the alien, for the duration of the validity of the affidavit of support. In the event that petitioner's Form I-864 does not meet the minimum federal poverty guideline amount and a joint sponsor is necessary, the petitioner is still responsible for any amount of income or assets included in his and/or her Form I-864.

9 FAM 40.41 N9.1 Public Charge Aspects of Medical Treatment Cases Under INA 212(g)

(TL:VISA-230; 01-19-2001)

Some hospitals and sanatoria are operated by state or federal agencies and do not make provisions for collecting fees from patients accepted for treatment. Thus, even if the institution is supported by public funds and will not be reimbursed for services rendered, an applicant eligible for the benefits of INA 212(g) is not considered ineligible to receive a visa under INA 212(a)(4).

9 FAM 40.41 N9.2 Duration of Obligation Under Form I-864, Affidavit of Support Section 213A of the Act

(TL:VISA-342; 01-08-2002)

Sponsors, joint sponsors, and household members (who have executed Form I-864, *Affidavit of Support Under Section 213A of the Act* or Form I-864A, *Contracts Between Sponsor and Household Member*) are bound by the contract terms until the applicant:

(1) Is naturalized,

(2) Has worked, or can be credited with, 40 qualifying quarters of work,

(3) Leaves the United States permanently, or

(4) Dies.

9 FAM 40.41 N9.3 Death of the Sponsor

(TL:VISA-342; 01-08-2002)

In the event that a sponsor dies, the sponsor's estate remains liable for the duration of the contract. If the sponsor dies after the principal applicant has immigrated, but before the qualified family members who are following to join have immigrated, the applicants must get another sponsor, although no new petition need be filed. If the principal applicant can meet the requirements to be a sponsor, he or she may submit the Form I-864, *Affidavit of Support Under Section 213A of the Act,* for his or her family members.

9 FAM 40.41 N10 "Means-Tested" Benefits

(TL:VISA-342; 01-08-2002)

a. During the life of the contract, a sponsor is liable for "means-tested benefits" received by the sponsored applicant. Federal, state and local agencies will define which benefits are "means-tested" and whether they wish to seek reimbursement.

b. The agency supplying the means-tested benefit must have so designated the program prior to the sponsor's submission of the Form I-864, *Affidavit of Support Under Section 213A of the Act,* to be reclaimable from the sponsor. Moreover, the agency must request reimbursement. In the absence of such a request, the sponsor is not liable.

c. It must be noted, moreover, that the participation of an applicant or sponsor in a supplemental program is not to be considered in a "public charge" determination. Only those programs that are paid in cash and are the primary source of the alien's income should be part of the totality of the circumstances for that alien.

d. As the Department has no role with respect to designating means-tested benefits or with reimbursement therefor, consular officers should not concern themselves with this issue.

9 FAM 40.41 N11 Public Charge Consideration in Non-immigrant Cases

(TL:VISA-230; 01-19-2001)

With the exception of non-immigrants who qualify under INA 101(a)(15)(A) or (G), who are exempt from the public charge provisions of the law under INA 102 (other than those classifiable as A-3 or G-5), all non-immigrants must overcome the public charge presumption. In determining eligibility under INA 212(a)(4), the consular officer must be aware of the differences in the requirements imposed on a would-be immigrant as opposed to a non-immigrant applicant. The amount and type of evidence generally required in an immigrant case is much greater than that required in a non-immigrant case. Evidence that establishes the applicant is entitled to a non-immigrant classification is generally sufficient to meet the requirements of INA 212(a)(4). For example, a temporary worker who is the beneficiary of an approved petition Form I-129H, *Petition To Classify Non-immigrant as Temporary Worker or Trainee*, or an information media representative who presents evidence of employment by a foreign information medium would not ordinarily have to present additional public charge evidence.

9 FAM 40.41 N11.2 Support Evidence for Non-immigrant Cases

(TL:VISA-342; 01-08-2002)

a. Extensive inquiry by a consular officer into the question of the possible public charge inadmissibility of a non-immigrant visa applicant should be rare if the alien is otherwise qualified for the visa category for which the alien has applied. Ordinarily, a non-immigrant would be required to provide evidence on the question of public charge only when there are clear indications, based on the usual evidence required to support the application, that the alien does not have sufficient resources to sustain himself or herself in the United States without reliance on public cash assistance.

b. However, if the evidence of non-immigrant status submitted does not indicate adequate provision for the applicant's support while in the United States and for the return abroad, consular officers may request specific financial evidence. Such evidence may take the form of a letter of invitation, an affidavit of support Form I-134, *Affidavit of Support*, from a sponsor that clearly indicates the sponsor's willingness to act in such capacity and the extent of financial responsibility undertaken for the applicant, or a public charge bond [see 9 FAM 40.41 N11.8].

c. Unless the consular officer is satisfied that the sponsor's financial position is sound, the affidavit of support should contain evidence of the sponsor's ability to carry out the commitment. Such affidavits of support for non-immigrant visas are not legally-binding contracts, and it is at the consular officer's discretion to determine if such evidence would assist a non-immigrant alien in overcoming a finding of visa ineligibility because of the likelihood of becoming a public charge after entering the United States. If the applicant is proceeding to the United States for a brief visit, the presentation of evidence of the sponsor's financial condition may not be necessary.

9 FAM 40.41 N11.4 Unwarranted Requirements

(TL:VISA-230; 01-19-2001)

No individual can make binding assertions about another person's possible future actions. If the consular officer determines that an affidavit of support is necessary, the sponsor (meaning the individual who has completed the affidavit of support) is not required to declare that the applicant will neither seek nor accept employment in the United States nor apply for permanent residence. Under certain circumstances, non-immigrants are permitted to work or, if not permitted to work at the time of admission, they may be permitted to work after their non-immigrant classification has been changed under INA 248. Moreover, a non-immigrant in the United States is entitled to apply for adjustment of status under INA 245 if eligible therefore.

9 FAM 40.41 N11.5 Alien's Government Requiring Evidence of Support

(TL:VISA-230; 01-19-2001)

Some foreign governments require their nationals to present evidence of support from a U.S. sponsor prior to the issuance of a passport or exit permit. Such documentation is usually required in the form of an affidavit of support guaranteeing that, while in the United States, the alien will not become a burden on the applicant's country. A consular officer serving in a country with this requirement should not automatically require all aliens applying for visas to submit a copy of the support evidence submitted to the alien's government. However, in some instances the officer may decide such evidence would be advisable.

9 FAM 40.41 N11.6 Aliens Seeking Admission for Medical Treatment

(TL:VISA-230; 01-19-2001)

If the personal resources of an applicant seeking admission to the United States for medical treatment are not sufficient or are unavailable for use outside the country of residence, the consular officer may accept a sponsorship affidavit. The affidavit should include explicit information regarding the arrangements made for the alien's support, medical care, and, if applicable, assurance that a bond will be posted if required by the Attorney General.

9 FAM 40.41 N11.7 Alien Seeking Admission as Fiancé(e)

(TL:VISA-342; 01-08-2002)

Since K-1 (fiancé(e) of a U.S. citizen) and K-2 (child of the fiancée(e) of a U.S. citizen) applicants are technically applying for non-immigrant visas, they should use the Form I-134, *Affidavit of Support*, if an affidavit of support is necessary. They will, however, have to submit the Form I-864, *Affidavit of Support Under Section 213A of the Act,* to the INS at the time of adjustment of status to that of a lawful permanent resident.

9 FAM 40.41 N11.8 Maintenance of Status Bond

(TL:VISA-492; 11-20-20021)

The consular officer may suggest the posting of a public charge bond pursuant to INA 213 in the case of an applicant who appears to qualify for the non-immigrant visa, except that the financial evidence submitted is not sufficient to establish the applicant is eligible to receive a visa under INA 212(a)(4), even with the presentation of a Form I-134, *Affidavit of Support*. The procedures for posting bond for non-immigrant visas are the same as those for immigrant visas. [See 9 FAM 40.41 N4.6-4.]

9 FAM 40.41 N12 INA 221(g) vs. INA 212(a)(4) Refusals

(TL:VISA-342; 01-08-2002)

The determination of whether INA 221(g) or INA 212(a)(4) is the appropriate ground of refusal is determined by the common sense distinction between what is "documentary" and what is "substantive."

(1) For example, if the Form I-864, *Affidavit of Support Under Section 213A of the Act* is technically deficient, not notarized, or requires updated information, it's a documentary problem; i.e., it's a matter of that document needing some correction or completion and the refusal should be based on INA 221(g).

(2) On the other hand, if the affidavit of support is technically complete, but does not reflect sufficient financial resources; or the applicant has no Form I-864 because the petitioner or sponsor does not meet the qualifying criteria set forth in INA 213A, that is a substantive problem and the consular officer must refuse the visa under lNA 212(a)(4).

9 FAM 40.41 N13 Referral of Questionable Cases

(TL:VISA-230; 01-19-2001)

Whenever the facts in the case do not present a clear outcome, consular officers should refer the case to CA/VO/L/A.